Public Prosecutor v Duis Akim & Ors

HIGH COURT (KOTA KINABALU) — CRIMINAL TRIAL NO K–47–03 OF 2001
SULONG MATJERAIE J
1 JUNE 2005

Constitutional Law — Public Prosecutor — Whether powers of Public Prosecutor usurped or curtailed — Whether s 177A of Criminal Procedure Code ultra vires the Federal Constitution — Criminal Procedure Code s 177A — Federal Constitution art 145(3)

Criminal Procedure — Charge — Framing or particulars of — Charge involves murder — Whether charge need to specify killing or object used for killing — Accused not called to plead charge before magistrate — Whether allowed in law — Whether charge was illegal — Penal Code s 302 —Criminal Procedure Code s 154 illustration (e)

Criminal Procedure — Consent or sanction — Consent — Whether prosecution instituted without consent of Public Prosecutor

Criminal Procedure — Police Investigation — Application for further detention order — Extension of detention period — Duties of magistrate — Whether grounds as stated in application subjected to careful judicial scrutiny — Grounds and authority for grant of remand order — Whether accused constitutionally remanded — Criminal Procedure Code ss 117 & 259 — Federal Constitution art 5(4)

Criminal Procedure — Transfer of cases — Power of magistrate — Charge involves murder — Whether case legally transferred to the High Court — Penal Code s 302

The accused was arrested on 22 June 2001 and was produced before the magistrate on 4 July 2001 to face a charge for murder under s 302 of the Penal Code. The charge was read and explained to the accused but no plea was recorded. Immediately at the commencement of the hearing of the murder trial, the accused raised five preliminary objections as follows: (a) the accused was unconstitutionally remanded; (b) the case was illegally transferred to the High Court; (c) the prosecution was instituted without consent of the Public Prosecutor; (d) that s 177A of the Criminal Procedure Code ('CPC') was *ultra vires* the Federal Constitution; and (e) the charge against the accused was illegal.

Held, dismissing the preliminary objections:

(1) Section 117 of the CPC specifically provided for the remand of a person arrested and detained in custody when it appeared that the investigation cannot be completed within 24 hours as fixed by s 28 of the CPC (see para 21). After the 15 days remand under the proviso of s 117 of the CPC, the police shall charge the accused and in the instant case the accused were charged on 4 July 2001. Therefore, from the date of arrest,

which was 22 June 2001 to 4 July 2001, being the date of the charge being read, it were all done within the 15 days time frame allowed under the law. Hence, there was therefore nothing illegal or unconstitutional (see para 22).

(2) Since the charge involves murder under s 302 of the Penal Code, the magistrate has no power to hear the case. Such case must therefore be transmitted to the High Court. This was governed by s 177A of the CPC (see para 23). Section 177A allowed for the accused to be produced before the magistrate's court during which time the charge will be read. Although the charge must be explained to the accused, he was not called upon to plead thereto. Therefore, what was done on 4 July 2001 before the magistrate in not asking the accused to plead was allowed under the law (see para 26).

(3) Before an instruction to the police to charge the accused could be made by the deputy public prosecutor, evaluation of the then available evidence must have been undertaken and after being satisfied, instruction was given to the police to frame the charge against the accused on 4 July 2001. It was obvious therefore that the charge preferred against the accused had the blessing and therefore the consent of the Public Prosecutor (see para 29).

(4) Section 259 of the CPC provided for the power to postpone or adjourn. The expression '...postpone the commencement or adjourn any inquiry or trial' was covered by the explanatory part of s 259 of the CPC which reads 'If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand'. Therefore, it was proper for the lower court to remand the accused person under s 259 of the CPC (see para 36).

(5) The powers of the Attorney General as enshrined in art 145(3) of the Federal Constitution was not usurped nor curtailed. The consent to prosecute under s 177A of the CPC laid solely with the Public Prosecutor and no one else. Article 5(4) of the Federal Constitution provides for a situation that an arrested person not released shall within 24 hours be produced before a magistrate and shall not be further detained in custody without the magistrate's authority. The authority given to the magistrate was found in s 259 of the CPC. Such being the case, there was no question of s 177A of the CPC being *ultra vires* of the Federal Constitution (see para 38).

(6) The charge before the court was for the purpose of the commencement of the trial where the accused was required to plead and it should not be confused with the charge before the magistrate where the accused was never called upon to plead thereto. There cannot be any confusion

as the person alleged to have been murdered remained the same and no murder can happen twice. The charge before this court was as per the consent of the deputy public prosecutor after a thorough evaluation of the evidence had been done (see para 67).

(7) In view of illustration (e) of s 154 of the CPC where it says as follows: 'A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B', there was no need for the prosecution to specify the killing or the object used for the killing in the charge. No injustice had been occasioned (see para 48).

[**Bahasa Malaysia summary**

Tertuduh ditangkap pada 22 Jun 2001 dan telah dihadapkan di hadapan majistret pada 4 Julai 2001 untuk menghadapi pertuduhan bunuh di bawah s302 Kanun Keseksaan. Penuduhan itu dibaca dan diterangkan kepada tertuduh tetapi tiada pli direkodkan. Pada permulaan pendengaran pembicaraan bunuh itu, tertuduh membangkitkan lima bantahan awalan seperti berikut: (a) tertuduh ditahan tanpa mengikut perlembagaan; (b) kes dipindahkan ke Mahkamah Tinggi secara salah di sisi undang-undang; (c) dakwaan dimulakan tanpa kebenaran Pendakwa Raya; (d) bahawa s 177A Kanun Acara Jenayah ('KAJ') adalah *ultra vires* kepada Perlembagaan Persekutuan; dan (e) penuduhan terhadap tertuduh adalah salah di sisi undang-undang.

Diputuskan, menolak bantahan-bantahan awalan itu:

(1) Seksyen 117 KAJ adalah dikhaskan untuk reman bagi orang yang ditangkap dan ditahan dalam jagaan sekiranya siasatan tidak dapat diselesaikan dalam masa 24 jam seperti yang telah ditetapkan dalam s 28 KAJ (lihat perenggan 21). Selepas reman selama 15 hari di bawah proviso s 117 KAJ, polis sepatutnya membuat pertuduhan terhadap tertuduh dan didalam kes ini tertuduh telah dituduh pada 4 Julai 2001. Oleh itu, daripada tarikh tangkapan, iaitu 22 Jun 2001 ke 4 Julai 2001, iaitu tarikh pertuduhan dibacakan, semuanya dilakukan dalam masa 15 hari yang dibenarkan di sisi undang-undang. Oleh itu, tiada apa-apa yang tidak sah atau tidak mengikut perlembagaan (lihat perenggan 22).

(2) Oleh kerana pertuduhan ini melibatkan pembunuhan di bawah s 302 Kanun Keseksaan, majistret tiada kuasa untuk membicarakan kes ini. Kes seperti ini sepatutnya dipindahkan ke Mahkamah Tinggi. Ini diperuntukkan di bawah s 177A KAJ (lihat perenggan 23). Seksyen 177A membenarkan tertuduh dibawa ke hadapan mahkamah majistret di mana pertuduhan akan dibaca. Walaupun pertuduhan itu mesti dijelaskan kepada tertuduh, tertuduh tidak dipanggil untuk membuat pli kepada pertuduhan itu. Oleh itu, apa yang berlaku para 4 Julai 2001 di hadapan majistret yang tidak mengarahkan tertuduh untuk membuat pli adalah dibenarkan oleh undang-undang (lihat perenggan 26).

(3) Sebelum satu arahan kepada polis untuk menuduh tertuduh boleh dibuat oleh penolong pendakwa raya, penilaian keterangan yang sedia ada mesti dibuat dan setelah puas hati, arahan telah diberi kepada polis untuk menulis pertuduhan yang sesuai terhadap tertuduh pada 4 Julai 2001. Adalah jelas bahawa pertuduhan terhadap tertuduh mempunyai kebenaran Pendakwa Raya (lihat perenggan 29).

(4) Seksyen 259 KAJ memberi kuasa untuk penangguhan. Ekspresi '...postpone the commencement or adjourn any inquiry or trial' meliputi bahagian s259 KAJ yang mengatakan 'If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.' Oleh itu, adalah betul untuk mahkamah rendah menahan pihak teruduh di bawah s 259 KAJ (lihat perenggan 36).

(5) Kuasa Peguam Negara seperti yand tertakluk di bawah per 145(3) Perlembagaan Persekutuaan tidak disekat. Kebenaran untuk mendakwa di bawah s 177A berada dengan Pendakwa Raya sahaja. Perkara 5(4) Perlembagaan Persekutuan memperuntukkan untuk situasi di mana orang yang ditahan tidak dilepaskan selepas 24 jam mesti dibawa ke hadapan majistret and tidak boleh ditahan dalam jagaan tanpa kebenaran majistret. Authoriti yang diberi kepada magistret adalah di bawah s 259 KAJ. Oleh itu, tiada persoalan berkenaan s 177A KAJ adalah *ultra vires* kepada Perlembagaan Persekutuan (lihat perenggan 38).

(6) Pertuduhan di hadapan mahkamah adalah untuk tujuan memulakan perbicaraan di mana tertuduh dikehendaki membuat pli dan ia tidak sepatutnya disalah anggap sebagai sama dengan pertuduhan di hadapan majistret di mana tertuduh tidak dipanggil untuk membuat pli. Tidak boleh wujud sebarang kekeliruan kerana orang yang dibunuh adalah orang yang sama dan pembunuhan itu tidak boleh berlaku dua kali. Pertuduhan di hadapan mahkamah ini adalah seperti yang dipersetujui oleh Pendakwa Raya selepas membuat penilaian mendalam mengenai keterangan kes ini (lihat perenggan 67).

(7) Mengikut ilustrasi (e) s 154 KAJ di mana ia mengatakan seperti berikut: 'A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B', pihak pendakwa tidak perlu menyatakan tindakan pembunuhan itu atau objek yang diguna untuk membunuh dalam pertuduhan itu. Tiada ketidakadilan yang telah berlaku (lihat perenggan 48).]

Notes

For a case on Public Prosecutor generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 reissue) para 1989.

For cases on application for further detention ubder s 117, see 5(1) *Mallal's Digest* (4th Ed, 2004 reissue) paras 2575–2576.
For cases on consent or sanction, see 5(1) *Mallal's Digest* (4th Ed, 2004 reissue) paras 4187–4188.
For cases on framing or particulars of, see 5(1) *Mallal's Digest* (4th Ed, 2004 reissue) paras 1086–1185.
For cases on power of magistrate, see 5(1) *Mallal's Digest* (4th Ed, 2004 reissue) paras 1377–1389.

Cases referred to

Hashim bin Saud v Yahya bin Hasim & Anor [1977] 1 MLJ 259 (refd)
Hj Mohamed Paiman v PP [1966] 1 MLJ 58 (refd)
PP v Chua Chor Kian [1998] 1 MLJ 167 (refd)
PP v LKI Holidays Sdn Bhd [1988] 1 MLJ 315 (refd)
PP v Oladatun Lukmaru & Ors [1991] 1 MLJ 187 (refd)
PP v Then Mee Kom [1983] 2 MLJ 344 (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)

Legislation referred to

Criminal Procedure Code [Sing] s 198
Criminal Procedure Code 1973 [Ind] ss 167, 309
Criminal Procedure Code ss 28, 34, 120, 154 illustration (e), 177, A, (1), (2), 259, (2), 376(iii), Chap XVII
Federal Constitution art 5(4), 145(3)
Penal Code s 302

Chau Chin Tang (Chau & Thien) for the third accused.
Clarence Foo (Deputy Public Prosecutor) (Attorney General's Chambers) for the Public Prosecutor.
Yunof E Maringking (Maringking & Co) for the first and second accused.

Sulong Matjeraie J:

RULING ON PRELIMINARY OBJECTIONS RAISED BY THE ACCUSED

[1] Immediately at the commencement of the hearing of the murder trial of Duis Akim, Vincent bin Gisup and Hendry bin Motodud (hereinafter referred to jointly as 'the accused'), the learned assigned counsel for the first and second accused, Mr Yunof E Maringking, raised five preliminary objections as follows:

(1) The accused was unconstitutionally remanded;
(2) The case was illegally transferred to the High Court;
(3) The prosecution was instituted without consent of the Public Prosecutor;

(4) That the s 177A of the Criminal Procedure Code ('CPC') is *ultra vires* of the Constitution; and

(5) The charge against the accused is illegal.

[2] Datuk Chau Chin Tang, learned counsel retained by the third accused, endorsed, the preliminary objections raised by Mr Yunof E Maringking.

BRIEF FACTS

[3] The accused was arrested on 22 June 2001 and was produced before the magistrate on 4 July 2001 to face a charge for the murder of Welfred bin Thomas under s 302 of the Penal Code. The charge was read and explained to the accused but no plea was recorded. The tentative charge reads as follows:

> Bahawa kamu pada 25 Mei 2001 jam lebih kurang 2.30pg, di Kedai 7 Eleven, Pekan Donggongon, di dalam Daerah Penampang, di dalam Negeri Sabah dengan niat bersamatelah melakukan kesalahan bunuh, menyebabkan kematian ke atas Welfred bin Thomas dengan cara menikam menggunakan parang lalu menyebabkan kematian. Oleh yang demikian kamu telah melakukan suatu kesalahan dan boleh dihukum dibawah s 302 Kanun Keseksaan.

[4] After the charge was read and explained to the accused, the prosecuting officer, Inspector Lim Swee Beng notified the court in the following manner:

> Not received chemist report.
>
> Request (mention) date. Under section 259.

[5] Mr Yunof Maringking who was present on that day said 'I am retained to do a watching brief for the families of all the three accused would like to request for a copy of the charge.

[6] The learned magistrate thereafter recorded in the notes of proceeding thus:

> 6 August 2001 (Mention). Remand s 259 then weekly thereafter.
>
> Signed: Siti Zulaiha Abdullah
>
> Magistrate.

[7] To the prosecution this charge is known as tentative charge that is before the case is transferred to the High Court. Upon receipt of the evidence needed, in this instant case, the post mortem and chemist reports and upon re-evaluating the whole evidence again, only then the public prosecutor would issue his consent.

[8] On 10 July 2001 the three accused persons were brought back to the court where the prosecuting officer, Inspector Faiezul applied for the extension of the remand and said:

> Motion extend remand terhadap ketiga-tiga.

[9] It was further recorded: 'first accused, second accused and third accused — faham' which means all the three accused 'understood' the application for an extension of the remand period.

[10] The notes of proceeding further say:

> Remand extended until 17 July 2001, then weekly.
>
> Signed: Ummu Kalthom Abdul Samad
>
> Magistrate.

[11] On 26 July 2001 the notes of proceeding indicate that the learned magistrate, Zaman Mohd Noor, allowed the prosecution's application for an 'Order to Produce Person in Custody' to enable all the accused to be brought to hospital for medical examination after an allegation by family members that the accused was beaten up by the police. The court notes read as follows:

> Prosecution: Insp Kenneth
>
> Pohon OTP untuk membolehkan ketiga-tiga tertuduh dibawa ke hospital. During the last mention date the family members alleged they were beaten by the police.
>
> Court: OTP to issue with covering letter stating the reason ie to conduct a medical check up as a result of their allegation that they had been beaten. The case is under police investigation.
>
> To 27 July 2001.
>
> Signed: Zaman Mohd Noor
>
> Magistrate.

[12] As scheduled, on 6 August 2001 the case was brought for mention. Inthe presence of the three accused and Mr Yunof Maringking, the police officer told the court that the chemist report and post mortem report were not ready yet and requested for another date. The case requires closer scrutiny. The notes of proceeding read:

> Prosecution: Laporan kimia, laporan post mortem belum siap lagi. Pendakwa pohon satu tarikh baru. Kes perlu penelitian teliti.

[13] Learned counsel, Mr Yunof Maringking, who was present on 6 August 2001 urged the court to discharge the accused and alleged that the detention of the accused was illegal.

[14] The learned Magistrate in rejecting learned Mr Yunof Maringking's argument, *inter-alia*, said in the notes of proceeding:

> Today's mention is to see whether the Public Prosecutor has already given his consent to the institution of the prosecution in the High Court and *not for further prosecution.* (Emphasis added.)

[15] Further the learned magistrate said:

> This case is fixed for re-mention to confirm whether the Public Prosecutor has given the consent or not. To 24 September 2001. OTP.
>
> Sgd: Zaman Mohd Moor
>
> Magistrate.

[16] On 24 September 2001 Inspector Kenneth for the prosecution said:

> Prosecution terima arahan dari senior federal counsel untuk pindahkan kes ke Mahkamah Tinggi. Izin dibenarkan.
>
> Court: Kes dipindahkan ke Mahkamah Tinggi.
>
> Sgd: Zaman Mohd Noor
>
> Magistrate.

[17] On 3 January 2002, the accused was produced at the High Court where the case was fixed for mention on 1 February 2002 to fix a trial date.

[18] At the High Court, a fresh charge was preferred against the accused and it reads as follows:

> That you all, on the 26 May 2001 at about 2am at a 7 Eleven Shop Donggongon Town in the District of Penampang in the State of Sabah in furtherance of common intention did commit murder by causing the death of one, Welfred bin Thomas 23 years, Dusun and that you all have thereby committed an offence punishable under s 302 of the Penal Code (FMS Cap 45) read together with s 34 of the same Code.

[19] The five grounds of preliminary objections are closely connected and I shall deal with them in the manner outlined in the submission of the learned counsel at enclosure 46 but there may be some inevitable overlapping of the facts and laws involved.

(1) The accused was unconstitutionally remanded

[20] Under the provision of s 117 CPC, when a suspect is arrested and detained and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall produce the accused before a magistrate who may authorise the detention of the suspect for a term not exceeding 15 days. Section 117 specifically provides for the remand of a person arrested and detained in custody when it appears that the investigation cannot be completed within 24 hours as fixed by s 28 CPC.

[21] Our section 117 CPC corresponds with s 167 of the Indian CPC 1973. It comes into operation only if the investigation cannot be completed within

24 hours as fixed by s 28 CPC. It allows the detention of a suspect to enable the police to complete their investigation, see *Hashim bin Saud v Yahya bin Hasim & Anor* [1977] 1 MLJ 259. However, such detention shall not exceed 15 days.

[22] After 15 days remand under the proviso of s 117 CPC, the police shall charge the accused and in this instance case the three accused were charged on 4 July 2001. Therefore, it should be noted here that from the date of arrest, which was 22 June 2001 to 4 July 2001, being the date of the charge being read to them were all done within the 15 days time frame allowed under the law. Hence, there is therefore nothing illegal or unconstitutional here.

[23] Since the charge involves murder under s 302 Penal Code, the magistrate has no power to hear the case. Such case must therefore be transmitted to the High Court. This is governed by s 177A CPC and for easy reference it is appended hereunder in full.

Section 177A

Transmission of case to, and trial by, the High Court

(1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:

Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(2) In any prosecution pursuant to sub-s (1), the accused shall be produced before the magistrate's court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before such court as soon as may be practical:

Provided that when the accused is brought before the magistrate's court before the Public Prosecutor has consented, the charge shall be explained to him but he shall not be called upon to plead thereto.

(3) When the accused appears or is brought before the High Court in accordance with sub-s (2), the High Court shall fix a date of his trial and shall be held in accordance with the procedure under Chapter XX.

[24] It is necessary at this juncture to examine the history of the insertion of s 177A into our CPC. This section was inserted by the Criminal Procedure Code (Amendment) Act 1995, which *inter alia*, abolished the preliminary inquiry procedure under the repealed Chap XVII of the CPC. Prior to this amendment Act, persons accused of offences ordinarily triable in the High Court had to

first undergo a preliminary inquiry under the repealed Chap XVII, save for certain offences (see *Mallal's Criminal Procedure* (5th Ed — Synopsis of section [7030]–[7050] Div I p 3281)

[25] This section attempts to facilitate the transmission of cases ordinarily triable in High Court. Before the amendment such cases had to proceed by way of committal after a lengthy and often slow process of a preliminary inquiry.

[26] It can also be seen here that it allows for the accused to be produced before the magistrate's court during which time the charge will be read and under the proviso of sub-s (2). Although the charge must be explained to the accused, he is not called upon to plead thereto. Therefore what was done on 4 July 2001 before the learned magistrate in not asking the accused to plead is allowed under the law.

[27] The other important element of this amendment is that the consent of the Public Prosecutor. The magistrate must wait for the consent of the Public Prosecutor to be obtained pursuant to sub-s (1).

[28] It has to be noted here that s 120 CPC requires the police to report to the Public Prosecutor of every investigation under Pt V — Information to the Police and their Powers to Investigate — Chap XIII, unless the offence be of a character which the Public Prosecutor has directed need not be reported to him. Cases which need not be reported to the Public Prosecutor are essentially minor offences. As this instant case relates to s 302 Penal Code, a report must be forwarded to the Public Prosecutor.

[29] Before an instruction to the police to charge the accused could be made by the deputy public prosecutor, evaluation of the then available evidence must have been undertaken and after being satisfied, instruction was given to the police to frame the charge against the accused on 4 July 2001. It is obvious therefore that the charge preferred against the accused on 4 July 2001 had the blessing and therefore the consent of the Public Prosecutor. The contention of the learned assigned counsel that the prosecution of the accused was instituted without the consent of the Public Prosecutor is without any basis.

[30] At this stage a pertinent point was made by the learned deputy public prosecutor, Tn Amir bin Nasruddin. He asked, while waiting for the consent of the Public Prosecutor, what can the magistrate do with the person who has been arrested and detained? He asked further, as to how the accused person can be dealt with when he is brought before the magistrate?

[31] Although s 177A CPC allows the arrested person to be remanded, itdoes not have any specific provision as to how remand should be dealt with. Generally remand is covered under s 117 and s 259 CPC. As observed earlier, the accused was initially detained under s 117 CPC. Upon such remand order being made the police forwarded the Investigation Papers to the Office of the Deputy Public Prosecutor who thereafter instructed the police to charge

the accused pending the completion of the certain reports, in this case, the chemist and post mortem reports. After the lapse of 15 days, s 117 CPC will no longer be applicable. Therefore s 259 CPC conies into play.

[32] Section 259 CPC provides for the power to postpone or adjourn proceedings and the full provision is as follows:

> Section 259
>
> (1) If, from the absence of a witness or any other *reasonable cause*, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody; provided that no magistrate *shall remand* an accused person to custody under this section for a term *exceeding eight days at a time*: provided further that where a government medical officer has certified that the complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.
>
> (2) Every order made under this section by the court of a magistrate shall be in writing, signed by the presiding magistrate, and shall state the reason therefore.
>
> Explanation — If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by remand, this is a reasonable cause for a remand.
>
> (Emphasis added.)

[33] This section corresponds with s 309 of the Indian CPC 1973 (Act 2 of 1974). It also corresponds with s 198 of the Singapore CPC. This section specifically empowers the court to postpone or adjourn any proceeding in the event of the absence of any witness or any other reasonable cause. In *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19 at p 19, Raja Azlan Shah J (as His Royal Highness then was) sagaciously said, 'Reasonable cause is a term of art for lawyers and no definite ruling can be laid down, each case must be dealt with according to its own peculiar circumstances. It is no doubt an important adjunct to the administration of justice ...'

[34] It is also pertinent to note here that sub-s (2) requires that the reason for the order of postponement or adjournment must be stated.

[35] It would appear however, that 'under the Indian 1898 Code an order for remand in the course of investigation when sufficient evidence had been collected to raise a suspicion that the accused might have committed the offence, could be made under s 344. This the court could do because of the expression in s 344 (now s 309) of that Code. From the words 'postpone the commencement of or adjourn any inquiry or trial, it was held that during investigation also the power to remand can be exercised under s 344 of that

code'. See pp 3427–27, 'Remand when investigation not complete' in Sohoni's *The Code of Criminal Procedure* (1973, 19th Ed).

[36] I agree with the submission of the learned deputy public prosecutor that the expression '... postpone the commencement or adjourn any inquiry or trial' is covered by the explanatory part of s 259 CPC which reads 'If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand'. Therefore I am of the view that it is proper for the lower court to remand the accused person under s 259 CPC.

[37] The authority of *Public Prosecutor v Oladatun Lukmaru & Ors* [1991] 1 MLJ 187 as adduced by learned assigned counsel strengthened the prosecution case as it requires the consent of the Public Prosecutor before the magistrate may transfer the case to the High Court. In the said case, the act of transmitting the case to the High Court prior to the consent of the Public Prosecutor is contrary to the legal provision.

[38] On the argument that where art 5(4) of the Federal Constitution read together with s 117(2) CPC, a magistrate can only authorise detention for a term not exceeding 15 days, it seems to me that the phrase 'shall not be further detained in custody without the Magistrate's authority' under art 5(4) allows such detention provided there is such authority. I am of the view that ss 177A and 259 CPC provide the magistrate with such authority.

[39] The other authority of *Hj Mohamed Paiman v Public Prosecutor* [1966] 1 MLJ 58 adduced by learned assigned counsel is of no relevance as it relates to the non production of a written consent. In this instant case, as it will be shown later, written consent was produced.

[40] It was further argued by learned assigned counsel that when the magistrate remanded the accused under s 259 CPC from 4 July 2001 until 6 August 2001, which is a total of more than 30 days, the magistrate also pre-empted further weekly remand thereafter but did not record the ground for it. It has been shown earlier that although the order made on 4 July 2001 puts 6 August 2001 as the next date for mention, the accused was brought before the court again on 10 July 2001, just six days later. This was because of the provision stipulated in section 259 CPC where the magistrate may only remand an accused person to custody under this section for a term of not more than eight days. A perusal of the warrant of remand in respect of all the three accused persons show in no uncertain terms that the remand which were issued under s 259 CPC were properly extended until the case was referred to the High Court on 4 January 2002.

[41] As regards the contention that the magistrate did not record the ground for it, this court takes judicial notice that anyone familiar with the workings of the subordinate courts would agree the fact that they have been

inundated with cases, day after day especially on a day assigned to hear mention cases. It is therefore not unusual in a case scheduled for mention for the prosecuting officer to briefly notify the court the reason for the application for extension of remand. After that the magistrate would normally give an appropriate order based on the submission of the prosecuting officer. Therefore it can be seen from the notes of proceeding dated 4 July 2001 that the prosecuting officer said that 'Not received chemist report. Request (mention) date. Under s 259'.

[42] Acting on that submission, the learned magistrate ordered that the case be mentioned again on 6 August 2001. 'Remand s 259 then weekly thereafter'.

[43] Similarly on 10 July 2001 where the prosecuting officer said 'Mohon extend remand terhadap ketiga-tiga'.

[44] The learned magistrate extended until 17 July 2001, then weekly.

[45] On 6 August 2001 the prosecuting officer notified the court that the chemist report and post mortem report are not ready and that the prosecution needed another new date as the case require closer scrutiny. On 6 August 2001 the learned magistrate did give his reason when he said: 'This case is fixed for re mention to confirm whether the Public Prosecutor has given the consent or not'.

[46] On 24 September 2001, the prosecuting officer said:

> Prosecution terima arahan dari senior federal counsel untuk pindahkan kes ke Mahkamah Tinggi. Izin dibenarkan.

[47] The learned magistrate said:

> Kes dipindahkan ke Mahkamah Tinggi.

[48] It can be observed from the above that although the grounds for further detention may not have been specifically recorded, it is obvious that the learned magistrate agreed to extend the application for remand based on what has been notified earlier to the court by the prosecuting officer. Of course, s 259(2) provides that the magistrate shall state the reasons for such extension of remand and this should have been done. However, having regard to what has been discussed earlier, I am of the considered view that no injustice has been occasioned on the accused.

[49] I therefore rule that the accused was correctly and properly placed on remand in accordance with the law from 4 July 2001 until the case was transferred to the High Court after the consent of the Public Prosecutor. I fail to find anything unconstitutional about it.

ITEMS 2 AND 3: THE CASE WAS ILLEGALLY TRANSFERRED TO THE HIGH COURT AND THE PROSECUTION WAS INSTITUTED WITHOUT CONSENT OF THE PUBLIC PROSECUTOR

[50] As these two matters are closely related, I shall deal with them together. For fear of overly repeating myself, I wish to say that when remand order was made under s 117 CPC, investigation papers are required under the law, specifically s 120 CPC, to be sent to the office of the deputy public prosecutor. Based on the then available evidence, instruction was given by the office of the deputy public prosecutor to the police to frame the charge, known to the prosecution as the tentative charge, which is essentially to inform the accused of what offence they are facing and for what purpose they are placed on remand under the provision of s 259 CPC.

[51] In order to determine the accuracy of the claim by the learned deputy public prosecutor that a consent letter issued by an officer appointed under s376(iii) CPC had been filed in the lower court, I caused a search to be made in case docket at the magistrate's court. I am to state categorically here that I have found in the case docket at the magistrate's court a consent issued under s 177A(1) CPC by one Abdul Rashid bin Sudin, deputy public prosecutor, the then senior federal counsel based in Kota Kinabalu. The consent which was dated 21 September 2001 allows prosecution against all the three accused in this case. I am unable to determine as to when exactly it was received by the lower court but judging from its location in the case docket, it is quite reasonable to say that it could have been sent on the alleged date of 24 September 2001.

[52] I have no reason to doubt the integrity and honesty of the learned deputy public prosecutor when he claimed that the consent dated 21 September 2001 was sent to the magistrate court on 24 September 2001. In the same breath may I say here that it is also apparent to me that the magistrate, who conducted the case on 4 July, 2001, the learned magistrate Pn Siti Zulaiha Abdullah, harbours not an iota of doubt to the claim made by the learned assigned counsel that he was 'retained to do a watching brief for the families of all the three accused' when no document to that effect was ever produced in court. In the event that such a document was produced, at least it was not recorded as such in the notes of proceeding!

[53] It is noted here that at the hearing on 24 September 2001, the magistrate after being informed by the prosecuting officer thus: 'Prosecution terima arahan dari senior federal counsel untuk pindahkan kes ke Mahkamah Tinggi. Izin dibenarkan' allowed the case to be transferred to High Court.

[54] 'Izin dibenarkan' could also mean consent is given.

[55] It is my considered view that after reading the ruling made by the same magistrate, Tn Zaman Mohd Noor on 6 August 2001 when the learned assigned counsel sought the release of the accused, it would be reasonable to

expect him to demand the production of the consent from the deputy public prosecutor. Alternatively, judging from the ruling, it would be reasonable to expect the learned magistrate would not have transferred the case to the High Court without sighting the consent. As can be seen the ruling that the same magistrate made consisted of seven paragraphs and he discussed about the consent of the public prosecutor in at least five paragraphs thereof.

[56] Touching on the contention of the learned assigned counsel as outlined in the last para of p 8 of encl 46, I cannot overemphasised the fact that it is misleading to say the least that the accused was remanded under s 177A CPC. As indicated earlier in my ruling, s 259 CPC provides for the mechanism to allow the court to postpone or adjourn proceedings and it was under this section that the remand of the accused was extended.

[57] It has also been explained earlier the requirement of s 120 CPC for the investigation papers to be forwarded to the office of the deputy public prosecutor, who would after perusing the then available evidence give instruction to the police to frame the charge against the accused resulting on the above mentioned tentative charge. After the chemist and post mortem reports are available, then the case needs a careful study. As seen in the earlier part of my ruling this cannot be taken to mean that it demonstrates that the police officer did not consult the DPP before the accused was charged for murder and that the Public Prosecutor had never obtained consent to prosecute the accused. The authorities of *Hj Mohamed Paiman v Public Prosecutor*, *Public Prosecutor v Chua Chor Kian* [1998] 1 MLJ 167 and *PP v Then Mee Kom* [1983] 2 MLJ 344 are neither appropriate nor relevant to this instant case.

[58] Given the facts as outlined above, I am of the considered view the case was legally and properly transferred to the High Court and that the prosecution was surely instituted with the consent of the Public Prosecutor.

SECTION 177A OF THE CRIMINAL PROCEDURE CODE IS ULTRA VIRES OF THE FEDERAL CONSTITUTION

[59] There are two aspects of the submission of the learned assigned counsel under this heading. Firstly art 145(3) of the Federal Constitution which conferred the Attorney General with the power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, anative court or a court-martial. It is alleged that s 177A CPC tantamounts to usurpation or curtailing the discretionary power of the Public Prosecutor and indirectly authorises remand of the accused person beyond 15 days.

[60] After discussing at great length the mechanism and procedure adopted from the investigation stage where reports must be forwarded to the Public Prosecutor as required by s 120 CPC, up to the time when the matter is referred to the High Court, I am of the view that the powers of the Attorney General as enshrined in art 145(3) of the Federal Constitution will not be

usurped nor curtailed. The consent to prosecute under s 177A CPC lies solely with the Public Prosecutor and no one else. The 'caveat1 found in s 177A(1) CPC is that prosecution can only be instituted with the consent of the Public Prosecutor. Further a person may be remanded in custody BUT the case shall not be further prosecuted until the consent has been obtained.

[61] As discussed earlier s 177A CPC provides for the mechanism of transmission of a case to and trial by the High Court. Section 259 CPC allows for postponement or adjournment of proceedings. No magistrate may remand an accused person to custody for a term exceeding eight days at a time.

[62] Again art 5(4) of the Federal Constitution provides for a situation that an arrested person not released *shall within 24 hours be produced before a magistrate and shall not be further detained in custody without the magistrate's authority*: (Emphasis added). The authority given to the magistrate is found in s 259 CPC. Such being the case, there is no question of s 177A CPC being ultra vires of the Federal Constitution.

[63] The hypothetical question posed by the learned assigned counsel as to what would happen to the case if the Public Prosecutor declines to give his consent is not within the realm of this court's function as it is not the practice to answer such question. It is best to leave it unanswered for this court deals with facts and evidence before it and not on hypothetical question which may be answered by academicians or perhaps the learned assigned counsel himself.

THE CHARGE AGAINST THE ACCUSED IS ILLEGAL

[64] Learned assigned counsel alleged that the charge preferred by the police officer stated the time of committing the crime on 25 May 2001 at 2.30am and without specific reliance on s 34 CPC. However the charge preferred by the DPP stated the time of the alleged committing of the crime as on 26 May 2001 at 2am and omitting the material particulars 'dengan cara menikam menggunakan parang lalu menyebabkan kematian' and relying on s 34 CPC.

[65] I agree with the submission that charged read on 4 July 2001 and the charge preferred by the DPP are for one and the same offence under s 302. The main difference is the date and the time. As the accused are still the same as well the deceased mentioned in the charge and the incidents that took place are still the same, I am of the view that no injustice has been occasioned here.

[66] The charge before this court today is for the purpose of the commencement of the trial where the accused is required to plead and it should not be confused with the charge before the magistrate where the accused was never called upon to plead thereto. There cannot be any confusion as the person alleged to have been murdered remained the same and no murder can happen twice.

[67] The charge before this court is as per the consent of the deputy public prosecutor as contained in his letter dated 21 September 2001 after a thorough

evaluation of the evidence had been done.

[68] In view of illustration (e) of s 154 CPC where it says as follows:

> A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B

[69] I feel that there is no need for the prosecution to specify the killing or the object used for the killing in the charge. As such the decision in *Public Prosecutor v LKI Holidays Sdn Bhd* [1988] 1 MLJ 315 need not necessarily apply in this instant case.

[70] I have read the submission of both the learned deputy public prosecutor and the assigned counsel and I have also gone through the authorities adduced in this court and I am satisfied that there has not been any blatant disregard of the constitutional rights of the accused. Every thing appears to have been done lawfully and legally. I am further satisfied that no injustice has been occasioned here on to the accused. In the circumstances the preliminary objection is hereby dismissed.

[71] As today is already the third day of the court vacation, coupled by the fact that I have a medical appointment at 2pm this afternoon, this case will be now be heard from 19 September 2005 until 23 September 2005.

[72] In the meantime, the remand of the accused is now extended under the provision of s 259 CPC. They must be brought back to this court on 19 September 2005.

Preliminary objections dismissed.

Reported by Peter Ling